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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
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Petition of the Alliance for Public Technology)
Requesting Issuance of Notice of Inquiry And) RM-9244
Notice of Proposed Rulemaking to Implement)
Section 706 of the 1996 Telecommunications Act)

REPLY COMMENTS OF THE ALLIANCE FOR PUBLIC TECHNOLOGY

INTRODUCTION

The Alliance for Public Technology ("APT") submits the following comments in response to views expressed on the above-captioned petition,¹ which it filed with the Commission on February 18, 1998. The many thoughtful comments raised issues for the Commission to consider as it prepares to implement Section 706. APT does not believe, however, that the opposing views have undermined its arguments for the need for immediate rulemaking and inquiry proceedings. Nor have they refuted APT's contention that Congress empowered the Commission in Section 706 to encourage ubiquitous deployment of high bandwidth capacity by removing barriers to infrastructure investment and adopting proactive measures to promote such investment.

Rather, the comments' divergent views underscore the importance of prompt Commission action to begin resolving these issues that are hindering consumers from receiving the substantial benefits of advanced technology. Access to advanced telecommunications can help to meet the life needs of millions of senior citizens, people

¹ Codified at 47 U.S.C. Sec. 157 note ("Section 706")

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with disabilities, rural residents, low income families, minorities, and small business owners, who historically have lacked opportunities to obtain the political, social and economic power to improve their lives. As society quickly incorporates new telecommunications technologies into daily life, the “digital divide between haves and have nots” that Chairman Kennard warns of will become more probable and problematic unless advanced infrastructure is available to everyone. Without equitable, affordable access to the sophisticated products and services that advanced networks can provide, residents of marginalized communities will face even greater disadvantages. Many commenters agree that the urgent need to prevent the emergence of a technology underclass supports the comprehensive rulemaking that APT recommends.²

DISCUSSION

Some opponents of APT’s petition incorrectly interpret Section 706 to require the Commission first to conduct an inquiry under subsection (b) to determine whether advanced capability is being deployed to all Americans in a “reasonable and timely” manner. Only then, they contend, can the Commission undertake any action to promote deployment of advanced telecommunications.³ In fact, MCI Telecommunications Corporation asserts that the Commission may not resort to the “price cap regulation,

² See, e.g., Comments of the National Association of the Deaf (April 10, 1998) (“NAD Comments”) at 2; and Joint Comments in Support of APT’s Petition Requesting Rulemaking Proceeding to Implement Section 706 of the 1996 Telecommunications Act filed by 27 Non-Profit Organizations and Four Individuals (April 13, 1998) (“Joint Comments”) at 1-2.

³ See e.g., Comments of Teleport Communications Group, Inc. (April 13, 1998) (“Teleport Comments”) at 2; Intermedia Communications Inc. Opposition to Alliance for Public Technology’s Petition for Notice of Inquiry and Notice of Proposed Rulemaking

regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment” authorized in Section 706(a) until after completing its subsection (b) inquiry.⁴

Such a reading contradicts, however, the plain language and straightforward structure of Section 706. Subsection (a) first establishes a general mandate that the federal and state telecommunications commissions encourage the “reasonable and timely” deployment of advanced telecommunications capability to all Americans and then itemizes the methods regulators may use to achieve that goal. In subsection (b), which follows, Congress requires the Commission “within 30 months after” enactment of the 1996 Telecommunications Act, and “regularly thereafter” to initiate inquiries to assess whether “reasonable and timely” deployment of advanced telecommunications capability is occurring (emphasis added). If the Commission determines that deployment is not progressing satisfactorily, then the Commission must “take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”⁵

Thus, Congress has established in Section 706, a clear statutory scheme that in subsection (a) obligates the Commission and its state counterparts to encourage the universal deployment of advanced telecommunications infrastructure, making clear its

(April 13, 1998) (“Intermedia Opposition”) at 5-6; Comments of Sprint Corporation (April 13, 1998) at 2.

⁴ Comments of MCI Telecommunications Corporation (April 13, 1998) (“MCI Comments”) at 4.

⁵ Section 706(b).

intent that the deployment advance in a “reasonable and timely” manner. Congress then creates in subsection (b) a failsafe measure to ensure that the Commission complies with the directive of subsection (a) by requiring that it conduct an initial review “within 30 months” of the Act’s enactment and subsequent periodic inquiries on the scope and pace of deployment.

Section 706 effectuates one of the primary purposes of the Telecommunications Act of 1996, which, as the title states, is to “encourage the rapid deployment of new telecommunications technologies” (emphasis added). This purpose and the plain meaning of Section 706 support APT’s view that the Commission’s obligations under Section 706 began on February 8, 1996 and apply to all of its proceedings.⁶ Senate Communications Subcommittee Chairman Conrad Burns (R-MT), the principal author of Section 706, seems to hold a similar view. During a hearing on April 22, 1998 to examine data congestion on the Internet caused by insufficient bandwidth, he stated that “significant investment is necessary to overcome this bandwidth deficit” and that Section 706 is an important way of addressing the problem. Senator Burns also made clear that the FCC’s implementation of the provision would be the subject of oversight and reauthorization hearings scheduled for May and June.⁷ If the Commission has no responsibilities under Section 706 until August 8, 1998, (30 months following the enactment of the 1996 Act), then why does Senator Burns, one of the primary drafters of Section 706, intend to consider the Commission’s implementation of the provision two or

⁶ See APT Petition at 13.

⁷ See “AT&T, CLEC Confront US WEST Over Bells’ Section 706 Bids,” *Telecommunications Reports* (Vol. 64, No. 17) April 27, 1998 at 6.

three months before the obligations begin? Following the reasoning of those who are opposing APT's request for immediate action under Section 706, Senator Burns' subcommittee hearings would be similarly premature.

On the contrary, implementation of Section 706 is languishing in the face of the public's urgent need for affordable access to advanced telecommunications capability. Therefore, it is imperative that the Commission begin as soon as possible the simultaneous inquiry and rulemaking that APT suggests. APT has demonstrated that Congress intended for the Commission to give Section 706 effect in all that the agency does. Indisputably, the Commission has gained vast experience in its proceedings on interconnection, access charges, universal service, and price caps, among others that, when combined with the record developing in this matter, provide a sound basis for modifying policies that have impeded infrastructure investment and facilities based competition. Accordingly, APT urges the Commission to reject suggestions that it issue a NOI followed by an NPRM since such sequential proceedings will only further delay the rapid deployment of advanced telecommunications that Congress desires for our nation's consumers.

The Commission has received some comments that question its authority to adopt APT's recommendation that the unbundling and resale requirements of Section 251(c) apply only to the network as it existed on August 8, 1996, but not to advanced capabilities.⁸ APT also proposed phasing out these requirements or sunseting them.⁹ Its

⁸ APT Petition at 15-19.

⁹ Id. at 19-22.

petition and comments on the petition have previously addressed the Commission's authority to take the proposed actions in an appropriate rulemaking proceeding in which the Commission would modify the rules implementing Section 251(c).¹⁰ Consequently, APT will not repeat them here.

APT submits this reply to emphasize its opinion that the Commission must use its authority under Section 706 to stimulate investment in advanced infrastructure by removing barriers to that investment. Recent statements by some members of the Commission indicate a willingness to accept this important challenge. For example, in discussing principles that he believes should guide the Commission's review of the regional Bell operating companies' petitions for authority to build data networks across LATAs and "larger issues under Section 706," Chairman Kennard stated last week that:

I, for one, am not afraid of seeing wireline telephone providers have a first mover advantage – if you make the investments to get to market first and provided that you do not use your control of the local network to stop or hinder others from investing and trying to be the first to market. I want to encourage the deployment of high bandwidth access to residential customers, particularly underserved areas, as well as schools and health care facilities across America. And I want to make sure that current regulation does not prevent the deployment of facilities that otherwise would be built. I want incumbent telephone companies to play a major role in the deployment of these services.¹¹

¹⁰ APT Petition at 17-19, including fn. 20; Comments of the Alliance for Public Technology Supporting Immediate Implementation of Section 706 of the Telecommunications Act of 1996 ("APT Comments") (April 13, 1998) at 1-3. APT stresses here that when the Commission adopted its rules implementing Section 251(c), it had the discretion to proceed along the lines urged in its petition, especially in light of the directive of Section 706 and provisions such as Sections 251(d)(2) outlining standards for determining necessary network elements. The Commission retains that discretion today. Of course, the agency can only revise its rules in an appropriate rulemaking proceeding, which APT implores it to begin as soon as possible.

¹¹ Remarks by Chairman William Kennard to USTA's Inside Washington Telecom, April 27, 1998, <http://www.fcc.gov/Speeches/Kennard/spwek813.html> (April 29, 1998) ("Chairman Kennard's Remarks") at 4.

Commissioner Gloria Tristani expressed a similar sentiment when she recognized that “...right now, incumbent local telcos are the on-ramp to the Internet. So I think the FCC needs to focus on what policies will maximize use of the local loops by incumbents and their competitors.”¹² She also stated that the Commission must “carefully consider the effect of unbundling on the incumbent’s incentive to innovate and deploy new technologies...” in expressing interest in exploring Bell Atlantic’s petition request that the Commission not define DSL equipment attached to loops as unbundled network elements.¹³ On the need to balance the interests of incumbents and new entrants to promote innovation, Commissioner Michael Powell stated recently that “when we go too far in shielding new entrants, we condemn incumbents to their existing lines of business

¹² “Section 706: An Opportunity for Broadband Competition Policy,” Remarks of Commissioner Gloria Tristani before the U S WEST Regional Oversight Committee, April 27, 1998, <http://www.fcc.gov/Speeches/Tristani/spgt807.html> (April 30, 1998) at 2. APT points out that the Comments of the Commercial Internet Exchange Association (April 13, 1998) at 3 urge a broader proceeding under Section 706 to evaluate methods for promoting advanced infrastructure investment by telecommunications providers other than ILECs. Similarly, the Economic Strategy Institute has recommended that the Commission’s Section 706 proceeding be technology neutral. While APT’s petition suggests ways of removing investment barriers for ILECs, that focus is not to suggest that the Commission exclude any telecommunications providers from the comprehensive proceedings that APT seeks. On the contrary, consistent with the technologically neutral definition of “advanced telecommunications capability” in Section 706, APT encourages broad industry participation in any proceedings the Commission initiates. The petition merely reflects APT’s agreement with Commissioner Tristani’s view that the ubiquity of the existing telephone networks offers viable paths to the home. Therefore, utilization of these networks for advanced services may help to speed their broad dissemination during construction of other competitive networks.

¹³ *Id.*, Remarks of Commissioner Gloria Tristani.

and services, thereby stifling innovation by sophisticated firms that may be uniquely positioned to provide significant benefits to consumers.”¹⁴

Recognition is growing regarding the need to modify regulatory policy to help hasten new services to consumers. As APT’s comments discussed,¹⁵ the New York Public Service Commission Chairman, with the apparent support of the Department of Justice, has voiced preliminary support for an agreement that would facilitate approval for Bell Atlantic to provide in-region interLATA service. Most pertinent here is that the agreement requires Bell Atlantic to offer competitors UNE platforms for residential customers that would sunset after four years in the New York City area and in six years in other areas of the state. These provisions are very similar to APT’s suggestion. Significantly, the Pennsylvania Public Utility Commission is adopting the New York agreement as a prototype.¹⁶ Richard Metzger, Vice President and General Counsel of the Association for Local Telecommunications Services (“ALTS”), recently endorsed the Pennsylvania PUC’s efforts to follow New York’s approach, which ALTS generally supports because it helps facilities-based competition by terminating on a specific date competitors’ ability to lease recombined network elements.¹⁷

Finally, APT understands that without the cooperation of regulators, providers and consumers, deployment of advanced telecommunications technology to everyone in

¹⁴ “Technology and Regulatory Thinking: Albert Einstein’s Warning,” Speech of Commissioner Michael K. Powell before the Legg Mason Investor Workshop (March 13, 1998) at 4.

¹⁵ APT Comments at 3.

¹⁶ See “Pennsylvania Uses New York as Model on InterLATA Plan,” *Telecommunications Reports* (Vol. 64, No. 17) April 30, 1998 at 30.

¹⁷ See *Communications Daily*, April 24, 1998 at 8.

the country, particularly to those that providers have overlooked in the past, will not occur in the “reasonable and timely” fashion that Section 706 demands. In fact, Chairman Kennard has already asked for the telephone industry’s “help in making sure that advanced services can become pipelines of opportunity not just for affluent areas, but also for rural and inner city America, in identifying whether these areas may lag behind as more advanced services are deployedand in finding out whether there are marketing realities that may hinder access to rural and inner city America, or whether these are just perceptions that need to be overcome.”¹⁸ Therefore, APT’s petition asks the Commission to establish a federal/state framework to encourage partnerships among communities and telecommunications carriers to identify needs that advanced technology can help to meet. In this way, the aggregated demand of various communities is more likely to attract infrastructure investment into markets that carriers traditionally deemed not to be viable.¹⁹ BellSouth and US WEST have expressed a willingness to explore such partnerships²⁰ and APT strongly advocates that the Commission work with them and others to facilitate them.

¹⁸ Chairman Kennard’s Remarks at 4.

¹⁹ APT Petition at 34-41.

²⁰ See Comments of BellSouth (April 13, 1998) at 14; and Comments of U S WEST Communications, Inc. (April 13, 1998) at 17.

CONCLUSION

In closing, APT reminds the Commission that each day that it delays implementing of Section 706, is another day that allows the “digital divide” between technology “haves and have nots” to widen. Consequently, APT asks that the Commission grant APT’s petition and immediately issue notices of inquiry and rulemaking to implement Section 706.

Respectfully submitted,

A handwritten signature in cursive script, reading "Maureen A. Lewis".

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May 4, 1998

CERTIFICATE OF SERVICE

I, Ginger Beverly, a secretary for Alliance for Public Technology, hereby certify that on the 4th day of May, 1998, copies of the foregoing "Reply Comments of the Alliance for Public Technology" In the Matter of Petition of the Alliance for Public Technology Requesting Issuance of Notice of Inquiry and Notice of Proposed Rulemaking to Implement Section 706 of the 1996 Telecommunications Act; RM-9244 were hand delivered to:

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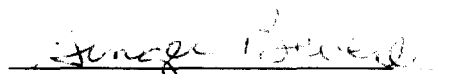
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